in which he discusses the need for STAs to serve "current customers." Findings, ¶¶ 114, 131-32; TWCV Exs. 35, 50.

267. The deliberate concealment of relevant, significant information from Liberty's May 4, 1995 STA requests is positive evidence of Liberty's lack of candor in dealing with the Commission, and is grounds for denying Liberty's applications. See, e.g., KQED, 3 FCC Rcd 2821 (renewal denied because licensee concealed from Commission true reason for darkening a channel); Mid-Ohio Communications, 5 FCC Rcd 940 (renewal denied because licensee concealed relevant facts regarding station manager's extensive responsibilities outside the station). Moreover, Liberty's lack of candor in dealing with the Commission did not end with its May 4 STA requests.

268. Subsequent to the May 4 STA requests, Liberty filed on May 17, 1995 a Surreply to TWCNYC's May 5, 1995 pleading. TWCV Ex. 18. In the Surreply, Liberty acknowledged that it was operating some microwave paths without licenses, but did not inform the Commission that it knew it was operating unlicensed facilities when it filed the May 4 STA requests. TWCV Ex. 18. In fact, Liberty has never revealed to the Commission that it knew it was operating the 14 paths for which it sought STAs on May 4 at the time it requested those STAs.

269. Liberty's Surreply merely contains numerous false and misleading assertions regarding the reasons Liberty was operating unlicensed paths that simply are not borne out by the record. For example, Liberty asserted that Mr. Nourain "assumed grant of the STA requests, which in his experience had always been granted within a matter of days of filing, and thus rendered the paths operational." TWCV Ex. 18. However, Mr. Nourain has

admitted that, prior to his employment at Liberty, he had no experience with STAs. L/B Ex. 7 (Nourain Deposition, 5/29/96), at 74. Thus, Mr. Nourain was turning on facilities without knowledge of either an STA or a license having been granted. Mr. Nourain knew that he needed authorization to operate new microwave paths (e.g., TWCV Ex. 51; L/B Ex. 7 (Nourain Deposition, 5/29/96), at 209), yet he deliberately turned on new paths without having such authorization in hand. See Findings, ¶¶ 49, 51, 172.

270. The Surreply asserts that Mr. Nourain did not know that processing of Liberty's applications was being delayed because of TWCNYC's Petitions to Deny. TWCV Ex. 18. However, it omits to state that Mr. Price did know, on January 11, 1995, that Commission processing of Liberty's applications was being delayed and that Mr. Price also knew, on a current weekly basis, about each of the thirteen new Liberty OFS facilities were activated during the months of January through April 1995. Findings, ¶¶ 45, 79, 178-80. Yet he never inquired of Mr. Nourain or anyone how it was possible that Liberty was able to continue activating new microwave facilities, when Commission processing of the applications for those facilities was being held up as a result of TWCNYC's Petitions to Deny.

271. The Surreply also claims that "processing for each of the above-referenced sites has exceeded the norm due to the frequency coordinator's use of incorrect emission designators." TWCV Ex. 18. The record shows that the emission designator problems were remedied in March 1995. Findings, ¶ 171. Thus, all applications filed after March 1995 -- such as those for 2727 Palisades and 200 E. 32nd Street -- were *not* delayed due to emission

designator problems. Id. Liberty's statement in the Surreply, therefore, is another example of a deliberate misrepresentation to the Commission.

272. Rather than simply being truthful with the Commission and admitting its knowing activation of unlicensed facilities, Liberty crafted an entire pleading of false reasons and excuses for its allegedly unintentional but nevertheless illegal microwave operations. See TWCV Ex. 18. The entire Surreply is an attempt to exonerate Liberty from blame for its illegal operations. In light of the evidence presented at the hearing in January 1997, in which it was conclusively shown that Liberty knowingly operated microwave paths without licenses (Findings, ¶¶ 49-67), and requested grants of STA for those paths when it knew that the paths were already operational (Findings, ¶ 155), the Surreply is reduced to nothing more than a collection of misrepresentations to the Commission. The Commission has denied applications for far less flagrant instances of misrepresentation than this, and it should deny Liberty's applications as well. See Character Policy Statement, 102 FCC 2d 1179, ¶ 60 ("The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.").

273. On May 19, 1995, Liberty filed an STA request for an additional microwave facility. Findings, ¶ 184; TWCV Ex. 38. This request implied that Liberty needed the STA to commence service over the facility, when in fact the facility was already operational. Findings, ¶¶ 186-87 . Liberty never did disclose to the Commission that this facility was operational at the time it filed the May 19 STA request. Findings, ¶ 186. Even when Liberty amended the May 19 STA request on May 24, 1995, it did not modify the May 19 request to disclose that the facility was already operational. Findings, ¶¶ 188-89; TWCV

Ex. 39. The omission of this material fact is further evidence of Liberty's lack of candor in dealing with the Commission. See, e.g., WHW Enterprises, 753 F.2d at 1139.

274. On May 26, 1995, Liberty filed a Reply to TWCNYC's Opposition to Liberty's Requests for STA ("Reply"). TWCV Ex. 19. Again, Liberty did not disclose its knowledge of unauthorized operations of microwave paths at the time of requesting STAs for those paths in this Reply. TWCV Ex. 19. Like the Surreply, the Reply is nothing more than a collection of misrepresentations. The entire May 26 Reply is based on a hypothetical situation that did not exist -- that Liberty needed STAs to provide service while waiting for final authorization. In light of the fact that Liberty was already providing service before it ever requested the STAs, the hypothetical situation described in the Reply is inherently deceptive.

275. The Reply contains a chart on page 3 designed to show the "urgency of Liberty's situation." TWCV Ex. 19. This chart lists locations with which Liberty has contracts to serve, the relevant contract date and the contractual commitment to install. What the chart does not indicate is the fact that, not only was equipment already installed in all of the listed locations, but service was being provided -- without authorization -- to all such locations. Findings, ¶¶ 192-95. It was blatantly deceptive for Liberty to claim that it urgently needed to provide service to those locations with which it had contracts when it was already providing service to such locations. Moreover, Liberty's claim that its "contractual obligations are imperiled as a result of the Time Warner filings" is deceptive as well. TWCV Ex. 19. Liberty's contractual obligations were not in any peril, because Liberty was already serving all the locations listed in the Reply. Findings, ¶ 194. Liberty had already

acknowledged to the Commission that these paths were operating without licenses in its May 17 Surreply. TWCV Ex. 18. Thus, Liberty's filing of the May 26 Reply, and its claim therein that it had an urgent need to begin providing service to buildings that it previously admitted were already being served, is not only deceptive, but pointless as well. The entire May 26 Reply is just another demonstration of Liberty's violation of its duty of candor.

276. The Commission, having been made aware of Liberty's unlicensed microwave operations, sought additional information from Liberty on this issue in the form of a June 9, 1995 letter written under authority of 47 U.S.C. § 308(b). TWCV Ex. 20. Liberty's June 16 response to this letter still did not reveal the fact that Liberty applied for STAs for 14 microwave paths that it knew were in operation illegally at the time the STA requests were made. TWCV Ex. 21. The fact that Liberty withheld relevant information when such information was "particularly elicited" by the Commission is especially egregious. See Swan Creek, 39 F.3d at 1222. Liberty had a duty to disclose such information whether or not the Commission asked for it specifically, and chose to disregard its duty entirely. See id. Moreover, the June 16 letter repeated the same unsupported claims that Liberty first made in the Surreply.

277. By June 22, 1995, Liberty knew that it was operating an additional four paths not only without licenses, but also without having even filed applications for licenses. TWCV Exs. 50, 25. Liberty never supplemented its Section 308(b) response with this new information. Findings, ¶ 36. Liberty also concealed this information from the Commission when it filed applications for those four paths on July 17, 1995. TWCV Ex. 25. Liberty's failure to provide the Commission with this information demonstrates not only a lack of

candor, but also violates Liberty's legal obligation to supplement its Section 308(b) response.[12]

2. Liberty attempted to corrupt the hearing process.

278. In addition to Liberty's series of false and misleading statements to the Commission, Liberty also systematically attempted to corrupt the entire hearing process by giving false, misleading and inconsistent testimony during depositions and during the January 1997 hearing. For example, Mr. Price testified during deposition that he first knew that Liberty was operating unlicensed microwave paths when TWCNYC filed its May 5, 1995 pleading at the Commission. L/B Ex. 9 (Price Deposition, 5/28/96), at 207-09. Mr. Price, however, knew of the unlicensed operations in late April 1995 -- days before TWCNYC's May 5 pleading, and days before Liberty's May 4 STA requests. Findings, ¶¶ 100-05, 227, 231. Mr. Price had to testify that he did not know about Liberty's unlicensed operations until May 5 so that Liberty's May 4 STA requests could not be said to contain any knowing misrepresentations to the Commission. Unfortunately for Liberty, Mr. Price and others did know about the illegal operations prior to Liberty's filing the May 4 STA requests, and those requests, therefore, contained knowing misrepresentations to the Commission in contravention with Commission rules and policies.

279. The record is replete with other examples of false, misleading and inconsistent testimony. See Findings, ¶¶ 227-31. The Commission has not, and should not, reward such behavior with the grant of licenses. The Commission has held that "[t]he unlicensed operation of a radio transmitter is one of the most serious violations under the

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[12]This issue is addressed more completely at part B.2., infra.

Communications Act." Robert J. Hartman, 9 FCC Rcd 2057 (1994) (citing Mebane Home Tel. Co., 51 RR 2d 926 (1982)). The fact that Liberty made misrepresentations to the Commission regarding such illegal operations compounds the severity of the violation. The Commission has denied or disqualified applications for far less egregious violations of the duty of candor and misrepresentation than those committed by Liberty. See RKO General, Inc. (WAXY-FM), 4 FCC Rcd 4679; Capitol City Broadcasting, 8 FCC Rcd 1726; Bomberger, 7 FCC Rcd 1849. Denial of Liberty's applications is entirely warranted in this case.

280. Even Liberty's pleadings submitted during the hearing proceeding demonstrate Liberty's lack of candor with the Commission. Specifically, Liberty's Motion for Summary Decision, submitted July 15, 1996, contains material omissions of relevant facts of which Liberty was aware when it filed the Motion. Findings, ¶¶ 211-12. In particular, Liberty argued that, because it had only discovered its unlicensed operations in "late April or early May" 1995 and it had revealed those operations to the Commission on May 17, no Commission Rule had been violated. However, the Joint Motion fails to state that Liberty's May 4 STA requests, in violation of Section 1.17 of the Commission's Rules, omitted a material fact known to Liberty -- that the STA requests were for facilities it had already activated. Findings, ¶ 212. The Commission simply should not tolerate such repeated violations of the duty of candor.[13]

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[13]While the Wireless Telecommunications Bureau joined in Liberty's Motion for Summary Decision, it is assumed that Bureau counsel knew no more than what was in the record at the time, and no criticism of Bureau counsel is intended.

3. Liberty lacked candor in conducting discovery.

281. Liberty also lacked candor in this proceeding in the conduct of its discovery. Specifically, almost every document that was produced out of time was produced from the files of Liberty's regulatory attorneys at Pepper & Corazzini. Findings, ¶¶ 213-20. None of these documents were duplicates of documents that had been produced from Liberty's files at any time. The notion that Liberty could have lost *all* copies of these important documents, when most documents were sent to multiple people at Liberty, is just not plausible.

282. Furthermore, several of the critically relevant documents in this proceeding were produced out of time. Findings, ¶¶ 213-31; TWCV Exs. 34, 50, 51; L/B Ex. 1. Some late-produced documents were produced at different times, but from the same files at Pepper & Corazzini. Findings, ¶¶ 213-20; TWCV Exs. 34, 51; L/B Ex. 1. Liberty can offer no valid justification for this phenomenon. Jennifer Richter's 1993 letter, an extremely significant document that both undercuts Mr. Nourain's dubious "assumptions" about the workings of the FCC licensing process and suggests the possibility of earlier unlicensed OFS operations by Liberty, was neither produced nor identified in the log of privileged documents, as required. The only conclusion is that Liberty lacked candor in conducting discovery and producing relevant and responsive information to the Commission and the parties. Such behavior cannot be tolerated in a Commission licensee. See WWOR-TV, 7 FCC Rcd 636 (1992) (application denied for lack of candor in failing to produce responsive evidence contained in applicant's attorney's files). Like the discovery request in WWOR-TV, the discovery in the present case specifically requested any responsive information or documents that are under the custody or control of Liberty's attorneys. See, e.g., Wireless

Telecommunications Bureau's Request for the Production of Documents by Liberty at 2. Also like the situation in WWOR-TV, Liberty was repeatedly asked to search both its files and the files of its attorneys for all documents relevant to the key issues in this proceeding, including that of determining on what date Liberty became aware that it was operating microwave paths without licenses. Liberty's concealment of documents relating directly to the date on which Liberty knew it was operating microwave paths illegally is just one more example of Liberty's lack of candor, and its total inability to deal forthrightly with the Commission. In accordance with its holding in WWOR-TV, the Commission should deny Liberty's applications.

B. Liberty flagrantly disregarded the Communications Act and the Commission's Rules and policies.

283. The Character Policy Statement expressly states that violations of the Communications Act, or the Commission's Rules or policies

> are matters which are predictive of licensee behavior and directly relevant to the Commission's regulatory activities. Thus, we will in the future treat violations of the Communications Act, Commission rules or Commission policies as having a potential bearing on character qualifications.

Character Policy Statement, 102 FCC 2d 1179, ¶ 56. As discussed above, the facts show that Liberty intentionally disregarded the Commission's character policy by lacking candor in dealing with the Commission, and by making repeated and material misrepresentations to the Commission. In addition, Liberty intentionally violated the Communications Act and the Commission's Rules.

284. First, Liberty is required to have a license from the Commission to operate microwave facilities. 47 U.S.C. § 301. The "unlicensed operation of a radio transmitter is

one of the most serious violations under the Communications Act." Robert J. Hartman, 9 FCC Rcd 2057 (citing Mebane Home Tel. Co., 51 RR 2d 926 (1982)). Liberty has admitted, both in pleadings to the Commission and in testimony in this proceeding, that it was operating 19 microwave paths without licenses in 1995. E.g., Findings, ¶ 27. Denial of Liberty's applications is an appropriate sanction for such a flagrant violation of the Communications Act.

285. Second, Liberty was obligated under the Commission's Rules to supplement its responses to the Commission's Section 308(b) requests if circumstances changed, or new information became available. All such written submissions to the Commission must be truthful and complete to the best of the applicant's knowledge. See 47 C.F.R. § 1.17.

286. Under Section 308(b),

> [t]he Commission, at any time . . . during the term of any . . . license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such . . . license should be revoked.

47 U.S.C. § 308(b). Any response to a Section 308(b) inquiry must also adhere to Section 1.17 of the Commission's Rules, which states that

> [N]o licensee shall in any response to Commission correspondence or inquiry or in any . . . written statement submitted to the Commission, make any representation or willful material omission bearing on any matter within the jurisdiction of the Commission.

47 C.F.R. § 1.17 (emphasis added).

287. Section 308(b), together with Section 1.17 of the Commission's Rules, creates the obligation for applicants to maintain the accuracy of their responses to Section 308(b) requests. The plain language of these provisions demonstrates the expectation for truthful, current and complete replies to Commission inquiries of its applicants and licensees.

288. Applicants are also obligated to follow the requirements of Section 1.65 of the Commission's Rules. Section 1.65 holds applicants "responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application." 47 C.F.R. § 1.65(a). Under this rule, applicants must amend their applications within 30 days of the occurrence or discovery of new information. Applicants must amend their applications if the pending application is no longer substantially accurate and complete, or if there are substantial changes as to any other matter that may be of decisional significance in a Commission proceeding involving the pending applications. Id. The requirements of Section 1.65 do not expire until the Commission's decision on the application is final -- a process that can take several years.

289. The Commission's standard of continuing accuracy of information under Section 1.65 is one that must apply by analogy to information requested pursuant to Section 308(b). Without applying a similarly rigorous standard to Section 308(b) requests, licensees could avoid full disclosure of relevant and significant information by strategically timing the launch of unauthorized operations.

290. The considerable scope of a licensee's obligations under Section 1.17 further supports this interpretation. In written responses to Section 308(b) requests, a licensee shall not "make *any* misrepresentation or material omission bearing on *any* matter within the jurisdiction of the commission." 47 C.F.R. § 1.17 (emphasis added). Accordingly, the broad reach of this responsibility necessarily includes matters that are materially relevant to, but occur or are discovered after, an initial response is made.

291. Liberty flagrantly disregarded the Commission's Rules and the Communications Act by its failure to timely disclose relevant and significant information regarding its OFS microwave operations and pending applications. First, as discussed in part B.1., supra, Liberty knew in late April 1995 that it was operating 14 unlicensed microwave paths. Findings, ¶ 155. Because applications for those paths had already been filed, Liberty was obligated under Section 1.65 of the Commission's Rules to amend its applications with this significant information within 30 days of its discovery thereof. While Liberty ultimately acknowledged that these paths were operating without licenses in its May 17, 1995 Surreply (TWCV Ex. 18), it never amended its applications pursuant to the Commission's mandate in Rule 1.65(a). The submission of this information, which is of decisional significance in the consideration of whether to grant Liberty's applications, in a pleading other than an amendment to the applications does not meet the requirements of Rule 1.65(a).

292. Next, Liberty failed to timely disclose its discovery of four additional unauthorized microwave paths in response to a specific Commission request for such information. Pursuant to its authority under Section 308(b), on June 9, 1995, the Commission requested information concerning the existence of microwave paths that had been activated prior to receiving FCC approval. TWCV Ex. 20. The Commission specifically requested "the date each unauthorized path was placed in operation as well as the number of subscribers currently being served by each new path." Id. On June 16, 1995, Liberty responded by admitting the existence of fifteen unauthorized microwave paths. TWCV Ex. 21. However, no later than June 22, 1995 -- just days after filing its June 16 response -- Liberty had discovered the existence of four additional unauthorized paths.

Findings, ¶ 207. Liberty applied for licenses for those four paths on July 17, 1995, but did not disclose that it was already operating the paths in its applications. It was not until Liberty filed STA requests for the same four paths on July 24, 1995 -- more than a month after it discovered the unlicensed operations -- that it informed the Commission that those paths were already operational. Findings, ¶ 209; TWCV Exs. 27, 30. Liberty's blatant concealment of highly relevant and significant information contravenes a licensee's duty to be truthful and complete in its response to Section 308(b) requests.

293. When Liberty discovered the four additional unlicensed paths on or before June 22, it had not yet filed applications for those paths. Liberty was obligated to submit this new information to the Commission in response to the Commission's Section 308(b) request, and in accordance with Rule 1.17. Liberty should not be excused from complying with Rule 1.65 merely because it had yet to file applications for these operational paths. If Liberty had properly filed applications for these four paths before commencing service and then activated them, the disclosure of the subsequent discovery of their having been activated would have been required by Rule 1.65(a). Liberty should not be permitted to circumvent the spirit and obligations of Rule 1.65(a) simply because it failed to properly file an application before commencing service over the path.

294. When Liberty finally filed applications for the four additional unlicensed paths on July 17, 1995, it was required under Rule 1.17 to submit truthful information, and not to "make any misrepresentation or willful material omission." However, Liberty deliberately omitted from its July 17 applications the fact that these paths were already operational. Findings, ¶¶ 205-09; TWCV Ex. 25. Furthermore, once the applications were filed, Liberty

was obligated to keep them current and accurate under Rule 1.65(a). Liberty never sought to amend its applications to reflect that the paths for which license were sought were already operational. Findings, ¶ 164. While Liberty did disclose that the four additional paths were already operational when it filed requests for STA for those paths on July 24, 1995, the disclosure of this information in a pleading other than an amendment to the application does not satisfy the requirements of Rule 1.65(a).

295. Liberty was obligated to update its Section 308(b) responses. Indeed, in the HDO, the Commission concluded that a "licensee's duty can be breached by . . . a failure to come forward with a statement of relevant facts, whether or not such information is particularly elicited by the Commission." HDO, 11 FCC Rcd 14133, ¶ 17 (citing Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995) (emphasis added)); see also Swan Creek, 39 F.3d 1217 (D.C. Cir. 1994); RKO General, Inc. v. FCC, 670 F.2d at 229-32 (D.C. Cir. 1981). Thus, even in the absence of the subsequent Section 308(b) request, which the Commission sent Liberty on August 4, 1995 (TWCV Ex. 28), Liberty had a duty to come forward with information about the additional path violations. Liberty was on notice that the Commission sought detailed information about Liberty's unauthorized operations. Indeed, Liberty's clear understanding of the scope and substance of the Commission's examination is evidenced by its initial admission of unauthorized microwave operations on June 16, 1995. Only days elapsed between this admission and the discovery of additional unauthorized paths. Findings, ¶¶ 35, 196, 207. This narrow time span illustrates the relevance of the new information, and further demonstrates the obligation to report it.

296. Liberty's failure to timely disclose its discovery of additional license violations should not go without sanction. The limitless scope of Section 308(b) requests, and the corresponding obligation for complete truthfulness in any written submissions to the Commission under Rule 1.17, establishes that there is a constant duty to maintain the accuracy of responses submitted. Liberty's failure to make such a disclosure constitutes a violation of Section 308(b) and the Commission's Rules, and further evidences its pattern of dishonesty and lack of candor before the Commission.

III. The Presiding Judge Must Consider The Evidence Contained In The Internal Audit Report When Making A Decision On The Merits Of This Case.

297. Before the Presiding Judge can reach a decision either to grant or deny Liberty's applications, he must examine Liberty's fitness to be a Commission licensee. Such an examination must include resolution of the following three issues: (1) the facts and circumstances and the procedural implications of Liberty's operation of hardwired, interconnected non-commonly owned buildings before first obtaining a franchise; (2) the facts and circumstances and the procedural implications of Liberty's unauthorized operation of private microwave facilities; and (3) the extent of Liberty's lack of candor and misrepresentation to the Commission as they relate to the hardwiring of interconnected buildings and the unauthorized operation of microwave facilities. HDO, 11 FCC Rcd 14133, ¶ 30. The provisions of the Administrative Procedure Act ("APA") mandate consideration of all relevant and helpful evidence in reaching such decisions. See 5 U.S.C. § 556(d). Thus, no reliable decision can be reached without the Presiding Judge's examination of the evidence contained in Liberty's Internal Audit Report ("Report").

298. The Report allegedly contains an analysis of the internal practices and procedures of Liberty in the operation of its cable service. By invoking a claim of privilege, Liberty has thus far prevented both the non-governmental parties to this proceeding and the Presiding Judge from viewing the contents of the Report.[14] However, in an affidavit supporting Liberty's efforts to keep the document confidential, Lloyd Constantine, one of Liberty's attorneys, explained the circumstances surrounding the creation of the report. TWCV Ex. 33. Upon discovery of unauthorized microwave service, Mr. Constantine states that he and his law firm were hired by Liberty to conduct an outside audit to determine if there existed additional illegal service on Liberty's microwave paths. Id. In conducting the audit, Mr. Constantine apparently had complete access to Liberty's books, records, personnel and officers and, consequently, "was able to discover errors which occurred in Liberty's licensing procedures and the reasons these errors occurred . . ." Id.

299. Mr. Constantine's statements regarding the contents of the Report, and the findings by the Wireless Telecommunications Bureau and the Commission in their decisions denying confidentiality of the Report are the only bits of information all the parties and the

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[14]Liberty originally submitted the Report to the Commission in response to the Commission's second Section 308(b) inquiry. Liberty simultaneously asked for confidential treatment of the Report, and did not furnish a copy of the Report to Time Warner, a party to the proceeding. The Wireless Telecommunications Bureau denied Liberty's request for confidentiality, and the full Commission affirmed that decision on review. Liberty Cable Co., 11 FCC Rcd 2475 (1996). Liberty has petitioned the D.C. Circuit for review of the Commission's decision, and has been granted a stay of the Commission's order to produce the Report to Time Warner and the public pending resolution of the appeal. See Liberty Cable Co. v. FCC, Nos. 96-1030 and 96-1094 (D.C. Cir. - pending). The stay granted by the D.C. Circuit has enabled Liberty to keep the Report confidential, even from the parties to this proceeding, while the appeal is pending. Oral argument on the appeal is scheduled for May 9, 1997.

Presiding Judge have regarding the contents of the Report. However, even this limited information is enough to reveal that the Report contains information that is not only plainly relevant, but also directly impacts the issues to be resolved in the instant proceeding. The errors discovered in Liberty's procedures and the reasons for those mistakes are extremely critical to the determination of both the facts and circumstances of Liberty's illegal wiring of interconnected buildings, and its provision of unauthorized microwave service. This evidence could quite possibly expose an even greater extent of Liberty's lack of candor and misrepresentations to the Commission. Such evidence must be considered in reaching the merits of this proceeding.

300. The provisions of the APA plainly state that: "[a] sanction may not be imposed . . . or order issued except on consideration of the whole record . . . and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). In the context of court review, "substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966). Moreover, the importance of an agency's evaluation of substantial evidence is described in this way:

> [i]f an agency considers the relevant factors and articulates a rational connection between the facts found and the choice made, the decision is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law and will be upheld if supported by substantial evidence.

Nagi v. United States, 751 F.2d 826, 828 (6th Cir. 1985).

301. Whether the information in this report provides a clearer context in which to evaluate Liberty's illegal activities, or reveals a basis for finding additional violations, a "reasonable mind" would conclude that review and consideration of the Report's content is

absolutely necessary to fulfill the legal and factual issues specified in the HDO. The Report, therefore, clearly constitutes "substantial evidence." Failure to consider this substantial evidence would not only violate the express provisions of the APA, but would seriously compromise the integrity and reliability of any decision regarding the applications in issue in this proceeding.

ULTIMATE CONCLUSIONS

302. The substantial record evidence shows that Liberty violated the Communications Act, and the Commission's Rules and policies in the application process and hearing proceeding, and as such, should not be awarded licenses for the above-captioned OFS microwave applications. In deciding whether to dismiss an applicant or licensee for character violations, the Commission has considered the following factors: 1) the willfulness of the misconduct; 2) the frequency of the offending behavior; 3) the time elapsed since the violation took place; 4) the seriousness of the misconduct; 5) the nature of the participation, if any, by managers and owners; 6) efforts made to remedy or avoid wrongdoing; and 7) the applicant's record of compliance with the Commission's Rules and policies. E.g., Character Policy Statement, 102 FCC 2d 1179, ¶ 102; Tempo Satellite, 7 FCC Rcd 2728, ¶ 3; David Bayer, 7 FCC Rcd 5054, ¶ 15 (1992). Consideration of these factors in the present case can only lead to the conclusion that Liberty's applications should not be granted.

303. Liberty has failed to meet its burden of proof in showing that its activation of 19 unlicensed microwave paths over a period of ten months was the result of an innocent mistake, as Liberty contends. There is no claim that the illegal operations were accidental, in the sense that each of these paths was turned on by mistake. Rather the claim is that the

activation was not "knowing" in the sense that Liberty did not know that it was violating the Communications Act and the Commission's Rules at the time each path was turned on. Assuming the legal validity of the argument, which is highly questionable, (see 47 U.S.C. § 312(f)(1); Paging Network of Los Angeles, Inc., 10 FCC Rcd 12213, ¶ 9 (1995); Esaw Industries, Inc., 9 FCC Rcd 2693, ¶ 4 (1994); Capitol Radiotelephone Inc., 8 FCC Rcd 6300, ¶ 11 (1993); Virginia RSA 6 Cellular Limited Partnership, 7 FCC Rcd 8022, ¶ 4 (1992); Benito Rish, 7 FCC Rcd 6036, ¶ 7 (1992); Southern California Broadcasting Co., 6 FCC Rcd 4387, ¶ 5 (1991); MCI Telecommunications Corp., 3 FCC Rcd 509, n.22 (1988) (subsequent history omitted)), it is not factually supported on this record.

304. First, Liberty clearly was aware of the licensing requirements and the Commission's procedures. The 1993 letter from Jennifer Richter to Bruce McKinnon, seen by Mr. Nourain and Mr. Price, unequivocally stated that operations could not begin prior to receipt of authority from the Commission, either an operating license or Special Temporary Authority. The letter also specified the anticipated time period required for Commission processing of applications and STA requests. Findings, ¶ 53.

305. Although Mr. Nourain claims to have assumed that STA requests had been filed in conjunction with applications for the paths and claims to have assumed that these requests had been granted before he activated the paths in question, there is no basis in the record that supports that assumption. Findings, ¶¶ 58-67. It must therefore be rejected as self-serving. Mr. Nourain was informed in February 1995 that Liberty was no longer operating under any STAs, and the company received no STAs after January of that year. Findings, ¶ 64. Liberty's FCC lawyer testified that STA requests were filed only at

Liberty's direction; and until after May 1995, Mr. Nourain was the one who signed those requests. Findings, ¶¶ 59, 169.

306. As to the timing of Commission action on the applications themselves, Liberty's President, Peter Price, spoke with the company's FCC counsel on January 11, 1995 and was advised that processing of the applications would be delayed as a result of TWCNYC's having filed petitions to deny. Findings, ¶ 38. Whether Mr. Price communicated this knowledge to Mr. Nourain or not is irrelevant. Mr. Price was functioning as chief operating officer of Liberty; if he knew, the company knew.

307. Mr. Price also knew that Liberty was continuing to activate new OFS facilities during the first four months of 1995. Findings, ¶ 45. He held weekly meetings with the Milsteins and his department heads, in which they all received reports from operations about new contracts, systems being constructed in new buildings and customers in new buildings being installed for Liberty's cable service. The problem with Liberty's claim of ignorance of the fact that it was operating unlicensed is not just that its president never asked anyone how Liberty was able to continue bringing new buildings on line in the first four months of 1995 when Commission action on its applications was stalled. The problem is that unless Liberty had made a policy decision to go ahead and activate new microwave facilities as needed, without regard to whether they were licensed, one would expect to have evidence that the company was revising its business strategy to take account of what Peter Price was told on January 11, 1995 -- that no new microwave license was going to be granted until TWCNYC's petition to deny was resolved. A revised business strategy based on what Mr. Price knew would have included: (1) ways to deal with customers to whom Liberty had

promised service but would not be able to deliver it; (2) consideration of what to do about $30,000.00 microwave receiving set-ups that were on order or had been delivered but could not be used; and (3) revisions to the sales staff's pitch to potential new buildings to account for the possibility that installation of service might be delayed more than 120 days' lead time provided for in the form contract. There is no evidence of any of this. Instead, the evidence is of business as usual -- a steady stream of new buildings coming on line in the first four months of 1995. In light of Mr. Price's knowledge in January 1995 that Liberty was not going to be receiving any more OFS authorizations for a while, there is only one explanation for this state of affairs: Liberty had decided to go forward without licenses and hope that it would not get caught.

308. Moreover, Mr. Nourain discussed the subject of delay with Liberty's FCC lawyer during the same period and had the same understanding as Mr. Price. Findings, ¶¶ 39, 198. Mr. Nourain's after-the-fact attempt to suggest that he thought TWCNYC had petitioned only against those applications for paths that were to replace cable interconnections to existing customers is not persuasive. The distinction is not one that his lawyer made or heard him make during the course of the conversations in the first four months of 1995, and Liberty would have no reason to be concerned about any delays if they were limited to the facilities that were to replace existing hardwire connections. Those customers were already being served; and Liberty was under no immediate obligation to terminate those hardwire connections.

309. Second, in the four cases for which Liberty activated paths before an application had even been filed, Liberty has claimed Mr. Nourain thought an application had

been filed because he had ordered a frequency coordination from Comsearch and assumed that the frequency coordination had been done, the information transmitted to Pepper & Corazzini and an application filed. Liberty has not offered documentary evidence that supports this claim for each of the paths in question. There is documentary evidence to support this argument for at most two of the paths. See generally Combined Opposition to Joint Motion for Summary Decision, September 11, 1996. Secondly, Mr. Nourain was the person who signed applications during that period. He and Liberty's FCC counsel have admitted that, contrary to the Commission's Rules, Mr. Nourain signed applications in blank which were then completed by Liberty's FCC counsel and filed with the Commission. Findings, ¶¶ 57, 88. If Liberty had been obeying the Commission's Rules, then Mr. Nourain would have had no basis for assuming the filing of applications that were not filed. His failure to have signed applications for those paths would have put him on notice that they had not been prepared. Under these circumstances, Liberty's argument is rejected. The Commission should not permit an applicant to argue its reliance on a procedure that flatly violates a clear Commission Rule -- signing applications in blank -- in an attempt to excuse unlicensed operation.

310. Third, Liberty's president and its chief engineer were advised of the status of all of Liberty's licenses and applications as of February 1995. Findings, ¶ 44. Liberty's chairman said he would have expected someone to have taken that information and compared it with Liberty's own list of activated facilities -- a list that was updated weekly. Findings, ¶¶ 46, 214. Indeed, the only purpose for such a license "Inventory" is that it be reconciled with a similar Inventory of operating facilities. Both Mr. Price and Mr. Nourain steadfastly

deny having performed that reconciliation or even having seen the "Inventory." Findings, ¶ 46. This self-serving testimony is not credible. On April 26, 1995, Mr. Nourain assembled a list of buildings with "current customers" for which STAs were needed. He assembled that list *before* he consulted with counsel. Indeed, he sent the list to counsel for verification. Findings, ¶ 129. Thus, on April 26, Mr. Nourain knew he was operating 15 unlicensed facilities *without having to consult with counsel*. The only way he could have known that was if he had a list of pending applications that either had been supplied to him (such as the February 24 Inventory) or that he maintained himself. The fact that he had his own license Inventory is further shown by the fact that Mr. Nourain's April 26 memo did not identify the four operating unlicensed facilities that were the subject of applications filed in July 1995. In short, Mr. Nourain has been unable to point to any new information that he acquired during the week of April 24, 1995 that allowed him to identify Liberty's operating and unlicensed facilities in his April 26 memo.[15] Therefore, if Mr. Nourain knew Liberty was operating unlicensed facilities on April 26 -- as he did -- he knew that fact well before that time.

311. Fourth, as the February 24th "Inventory" shows, there were many other Liberty applications pending in the first four months of 1995. L/B Ex. 1. Liberty has offered no explanation as to why all of these paths that were the subject of pending

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[15]Indeed, Liberty's counsel have taken the extraordinary steps of disavowing on the record Mr. Nourain's explanation as to how he "discovered" that Liberty was operating unlicensed and then sending the Presiding Judge a letter signed by both hearing counsel stating that Liberty "does not rely" on such testimony. A copy of this letter is attached hereto as Attachment A. Such a letter would only be appropriate where trial counsel feel that they are ethically obligated to reveal their knowledge that a fraud has been committed on the tribunal. See D.C. Bar Rule 3.3(b).

applications were not activated. If Mr. Nourain activated the paths identified in Appendix A to the HDO because he thought STA requests had been filed for them and granted, then why did he not have the same belief for the other paths for which applications were pending? As the chart relating activation dates to other dates shows, there was no particular consistency in the time interval between when a Comsearch frequency coordination was ordered by Mr. Nourain and when he activated the facility that was the subject of that coordination. Findings, ¶ 18. Moreover, at least one of the illegally activated facilities -- 2727 Palisades Avenue -- was *not* the subject of a petition to deny and was not affected by the "emission designator" problem that appeared to affect some of the other applications.

312. Finally, as the varying accounts of the witnesses establish, Liberty has failed to present a coherent, consistent story of the "discovery" of the fact that Liberty was operating unlicensed paths. See Findings, ¶¶ 89-123. All of the witnesses ultimately refer back to Mr. Nourain, and the story he tells (of the facsimile from headquarters) is one that Liberty's counsel have expressly disavowed. Findings, ¶¶ 118-21. None of the participants seem to have behaved with a particular sense of urgency. For example, Mr. Price took off for the weekend before 5:00 p.m. on Friday, April 28, and so it was not until the following Monday that he saw Messrs. Barr and Lehmkuhl's faxed April 28 memorandum confirming the need to file STA requests for the paths identified in Mr. Nourain's memo of April 26. Findings, ¶ 141. Yet he justifies Liberty's failure to state in the STA requests filed on May 4 that Liberty was operating these facilities unlicensed with a claimed lack of time to "get the full story" in time to make the filing. Findings, ¶¶ 146-47.

313. While neither the Wireless Telecommunications Bureau nor the private petitioners -- TWCNYC and Cablevision -- have the burden of making such a showing in order to justify the actions taken here, the totality of the evidence suggests that there was no "discovery" of Liberty's unlicensed operations because it was a fact that was known all along to everyone but Messrs. Barr and Lehmkuhl, Liberty's FCC counsel. Rather, what happened was that, with increasing numbers of unlicensed facilities and the passage of increasing amounts of time without a resolution of TWCNYC's petitions to deny in sight, Liberty became very concerned about the risk of being found out. Mr. Nourain was directed to determine the size of the problem, which he did in his April 26 memo, and the lawyers were asked to reconsider their prior recommendation that STA filings would be a futile effort. The lawyers were consulted on April 27 and, "in light of the seriousness of the situation," the "STA concept" was implemented, with the STA requests being filed on May 4. Only after TWCNYC filed a paper on May 5 charging Liberty with unlicensed operation, did Liberty's FCC lawyers begin work on a document to advise the Commission of the scope of what the company has admitted knowing during the week of April 24, and probably knew much earlier. Findings, ¶ 151.

314. The record also shows that Liberty willfully concealed substantial and relevant information from the Commission in the application process, during discovery, and throughout the hearing proceeding. Liberty also committed repeated acts of deliberate concealment and material misrepresentation. See Findings, ¶¶ 145-236. Liberty's deceitful conduct was not just a one-time event. Furthermore, Liberty engaged in deceitful conduct throughout the hearing proceeding, as recently as January 1997, when it produced yet